United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

ORIGINAL 77-4118

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE LONG ISLAND RAIL ROAD COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
RESPONDENTS

ON PETITION TO REVIEW AN ORDER OF
THE INTERSTATE COMMERCE COMMISSION

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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ISSUES PRESENTED

The ultimate issue presented for review is whether the Interstate Commerce Commission's decision, refusing to find joint incentive rates on fresh fruits and vegetables from southwestern territory to destinations on the Long Island Rail Road Company to be in violation of Sections 1(6) and 3(1) of the Interstate Commerce Act (49 U.S.C. 1(6), 3(1))) has a rational basis and is otherwise in accord with law.

Subsidiary issues presented are:

(1) Whether the Commission's action was based on its belief that the Long Island's dispute with the other railroads centered over the division of rate revenues; and

(2) Whether the Commission's order is consistent with its decision in Docket No. 35960, Sunkist Growers, Inc., et al. v. The Akron, Canton & Youngstown Railroad Company, et al.

STATUTES INVOLVED

The statutes primarily involved in this case are Sections 1(6), 3(1) and 15(6) of the Interstate Commerce Act (49 U.S.C. 1(6), 3(1), and 15(6)). These sections are reproduced in Addendum A to this brief.

STATEMENT OF THE CASE

This is an action brought by the Long Island Rail Road Company (LIRR or Long Island) to review and set aside an order of the Interstate Commerce Commission entered in Docket No. 36432, Fresh Fruits and Vegetables from the Southwest. In its order the Commission refused to prescribe rates to points on the LIRR that, when coupled with a 12.5 percent terminal surcharge levied on all traffic moving to and from points on the Long Island, would equal rates the Commission found to be just and reasonable to points on the other railroads.

A. Background

This case has its genesis in earlier Commission proceedings involving the LIRR and circumstances peculiar to its operations. The Long Island's status as a carrier predominantly of passengers is unique. Indeed, less than 10 percent of its revenues are derived from freight operations. Thus, when Congress enacted P.L. 93-69 in 1973, increasing taxes on railroads to be contributed toward additional retirement benefits

for all railroad employees, the LIRR was required to pay the increased tax on their many employees engaged in intrastate passenger operations as well as those relatively few engaged in interstate freight operations.

Congress provided in P.L. 63-69, however, that the railroads could offset their increased taxes by passing through the increases to shippers through higher rates.[1/] Congress directed the Commission to determine the extent of the rate increases. All of the Nation's railroads, other than the Long Island, offset their increased tax expenses by obtaining a general rate increase of 2.8 percent in Ex Parte No. 299, Increases in Freight Rates and Charges to Offset Retirement Tax Increases.

The LIRR decided, however, to take independent action and not join the petition of the other railroads for a 2.8 percent general rate increase.[2/] Instead, the Commission authorized the LIRR to increase the level of its interstate freight rates by imposing a 12.5 percent terminal surcharge on all traffic moving to and from points on the Long Island in Ex Parte No. 299 (Sub-No. 1). As we have already noted, the

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1/ P.L. 93-69, Title II, "Railroad Rate Adjustment Act of 1973" (49 U.S.C. 15a(6)).

2/ In railroad parlance the LIRR "flagged out" of the increase.

LIRR's action resulted from its unique situation. Had the railroad joined in the 2.8 percent general increase, the Long Island would have received only $269,000 in additional revenue to meet the $6 million in increased retirement tax expenses.

In addition to flagging out of Ex Parte No. 299, the Long Island has also flagged out of a number of other general freight increases since 1969. While Long Island's initial efforts to flag out were unsuccessful, its right not to participate in general increase proceedings was eventually established in Ajayem Lumber Co. v. Penn Central Transportation Co., 487 F. 2d 179 (2nd Cir. 1973), opinion clarified and affirmed on rehearing, 496 F. 2d 21 (1974), cert. denied, 219 U.S. 884 (1974). However, when the Consolidated Rail Corporation (ConRail) was created in 1973, it was permitted to adopt or reject its predecessors' existing joint rates. As ConRail refused to adopt existing joint rates with the Long Island because they did not reflect the more recent general rate increases, the LIRR eventually agreed to modify its position. The Long Island agreed to concur in all prior general increase proceedings (except Ex Parte No. 299 and Ex Parte No. 305) in exchange for ConRail adopting the existing joint rates with the Long Island. Since the Ex Parte No. 299 (2.8 percent) and the Ex Parte No. 305 (10 percent) increases roughly approximated the 12.5 percent terminal surcharge authorized in Ex Parte No. 299 (Sub-No. 1), the agreement enabled the railroad to keep its surcharge and otherwise preserve rate parity with its railroad competitors in the New York area.

B. The Instant Proceeding

In 1976 the southwestern railroads and their eastern and southern connections (other than the LIRR) filed a comprehensive revision of rates on fresh fruit and vegetables originating in southwestern territory. While the Commission refused to suspend the proposed rates, it did institute an investigation into the reasonableness and lawfulness of the schedules.[3/] By their proposal the railroads sought to provide reasonably compensatory rates on fresh fruits and vegetables. They contended that the existing rates were based on the use of old ice bunker cars which have a maximum capacity of about 40,000 pounds. Since 1949, however, these cars have been gradually replaced by much larger mechanically refrigerated cars having a maximum capacity of up to 90,000 pounds. In the railroads' view, the existing rates failed to reflect the current economics of handling perishables by rail.

The incentive rates provided for both increases and decreases in the existing rates. Higher rates were imposed in the lower weight brackets and lower rates in the higher brackets. The built-in incentive to ship heavier loads was designed to produce overall higher per car revenues and better cost to revenue ratios.

3/ At the same time the Commission also instituted an investigation into the reasonableness and lawfulness of the new rates on fresh fruits and vegetables to transcontinental territory in Docket No. 36432 (Sub-No. 1). The transcontinental proceeding, however, was later severed from the instant proceeding and is currently pending before the Commission.

An oral hearing was held on the railroads' proposal in 1976. While the administrative law judge (ALJ) found that the rates under investigation were just and reasonable, he also found they resulted in an unreasonable practice under Section 1(6) of the Act and were unduly preferential and prejudicial under Section 3(1) to the extent that the rates on points to the LIRR, when combined with its surcharge, resulted in LIRR receivers paying total transportation charges in excess of those paid by nearby receivers. Accordingly, the ALJ ordered the rates to be cancelled.

The railroads filed exceptions to the initial decision contending that: (1) the ALJ erred in finding rates to LIRR points violated Sections 1(6) and 3(1); (2) equalization or rate charges was not warranted since the dispute was essentially one involving the division of rate revenues; (3) no rate disparity had been established by Long Island shippers.

On review, the Commission's Division 2 affirmed and adopted the ALJ's conclusion that the new rates were just and reasonable. However, the Commission modified the ALJ's decision to the extent that he found the rates to LIRR points resulted in Section 1(6) and Section 3(1) violations. The Commission stated (Doc. No. 57, p. 3):

> We find, That the evidence of record fails to establish that the rates to points on the LIRR, when combined with the LIRR's surcharge, result in unequal total transportation charges in violation of sections

1(6) and 3(1) of the act; that the record does not show that receivers on the LIRR are unduly prejudiced by the difference in rates and none have appeared or otherwise complained that they are so prejudiced; that in fact, as is noted by the LIRR, the rates to points on its lines are lower than rates to other New York group points because they have failed to join in the new rates;that it is also noted by the parties that a division's dispute is in progress between the LIRR and the other carriers; that the 4R Act establishes new procedures for the handling of division disputes in §15(6)(b); and therefore, it is inappropriate at this time to make any determination on this issue; (footnote omitted.).

After the Long Island's petition for a finding that an issue of general transportation importance was involved was denied by the Commission, the LIRR filed the instant petition for review of the Commission's order on June 7, 1977.

SUMMARY OF ARGUMENT

This proceeding involves but one in a long series of rate battles between the Long Island and the Nation's other railroads. Here, the Long Island would have this Court direct the Commission to prescribe incentive rates on fresh fruits and vegetables to LIRR points at a level lower than that approved for produce moving to nearby points -- even though no Long Island receivers participated in the rate proceeding or complained of the higher rate level.

As we shall demonstrate, the Commission properly refused to prescribe rates at a lower level to Long Island points because there was not one scintilla of probative evidence to indicate the approved rates resulted in an unlawful rate practice or in any way effected a prejudice against Long Island receivers.

We will further establish that the Commission's action was in no way influenced by the fact that the Long Island and the other railroads are presently engaged in a discussion over the division of rate revenues.

Finally, we will show that the Commission's order in this case is not inconsistent with its recent decision in Docket No. 35960, Sunkist Growers, Inc. v. The Akron, Canton & Youngstown Railroad Company.

ARGUMENT

I

THERE IS A RATIONAL BASIS FOR THE COMMISSION'S CONCLUSION THAT THE NEW RATES ON FRESH FRUITS AND VEGETABLES DO NOT RESULT IN AN UNLAWFUL PRACTICE OR EFFECT AN UNREASONABLE PREJUDICE AGAINST LONG ISLAND RECEIVERS UNDER SECTIONS 1(6) AND 3(1) OF THE ACT

At the outset it is important to note that the Commission's conclusion that the new rates on fresh fruits and vegetables were just and reasonable is not at issue in this proceeding. Rather, the issue before this Court involves the Commission's conclusion that the new rates on fresh fruits and vegetables do not result in an unlawful practice or effect an unreasonable prejudice against Long Island receivers under Sections 1(6) and 3(1) of the Act. On appeal the LIRR attacks the Commission's conclusion. As we shall demonstrate there is no merit to this assertion.

1. Section 3(1) of the Act proscribes any action by a rail carrier that causes undue or unreasonable preference or advantage to any person or firm, or action which subjects any person to any undue or unreasoanble prejudice or disadvantage. The standards for establishing a violation of this section are now well-established. To establish a finding of a violation of Section 3(1) the complainant has the burden of proving the following three factors:

(1) there is disparity in rates;

(2) the complaining party is competitively injured;

(3) the defendant carriers are the common source of both the allegedly prejudicial and preferential treatment.

Once the complainant establishes these facts, the burden of proof shifts to the carriers to prove the disparity in rates is justified by transportation conditions. Chicago Board of Trade v. Illinois Central R.R. Co., 344 I.C.C. 818, 840 (1973), sustained sub nom. Chicago & E.I.R.R. Co. v. United States, 384 F. Supp. 298 (N.D. Ill. 1974), aff'd mem., 421 U.S. 956 (1975).

Here, the LIRR totally failed to prove the existence of the first three criteria. First, as a threshold matter, the Long Island had no standing to raise a Section 3(1) issue before the Commission. It is well-established that Section 3(1) findings cannot be made in a dispute between carriers on the basis of carrier evidence alone. Delaware, L & W R. Co. v. Kutter, 147 Fed. 51 (2nd Cir. 1906), cert. den., 203 U.S. 588; Oklahoma-Arkansas Telephone Co. v. Southwestern Bell, 183 I.C.C. 771, 774 (1932). As no Long Island receivers participated in the proceeding, let alone raised Section 3(1) issues, the LIRR had no right to raise the Section 3(1) issue before the Commission. Thus, the Commission could have refused to find a Section 3(1) violation on this ground alone.

Second, the LIRR neither introduced any probative evidence of a rate disparity between rates to Long Island points and nearby points served by other railroads, nor did the ALJ make any such finding. To the contrary, the evidence established the rates applied evenly to all points, including the LIRR. While addition of the Long Island's 12.5 percent terminal surcharge would result in Long Island receivers paying total freight charges in excess of those paid by

shippers to nearby points, this by no means constitutes a rate disparity.[4/] Indeed, as we have already noted, no LIRR receivers participated in the proceeding or raised the issue of rate disparity. In these circumstances, there was no basis for the Commission to have found the type of rate disparity necessary to establish a Section 3(1) violation.

Third, there is no evidence in the record to establish that any Long Island receivers suffered or will suffer any competitive injury as a result of the new rates. In order to prove a Section 3(1) violation it is necessary to show that the prejudiced shipper is handicapped in the sale of its products by the difference in the rates it must pay and the rates available to its competitors. A. Lindberg & Sons, Inc. v. United States, 408 F. Supp. 1032, 1037-1038 (W.D. Mich. 1976); Scheneley Distillers, Inc. v. Cincinnati, N.O. & T.P. Ry. Co., 300 I.C.C. 331, 334 (1957); Pie Bakeries, Inc. v. Railway Express Agency, Inc., 225 I.C.C. 171, 174 (1937). Here, the record was devoid of any evidence demonstrating injury to Long Island receivers. Where rail shippers, located at allegedly prejudiced points, do not compalin and testify as to their injuries there is no basis for the Commission to find undue prejudice. Northwestern Leather Co. v. Director General, 69 I.C.C. 425, 426 (1922).

4/ The LIRR, in fact, flagged out of the new rates.

Fourth, there is no evidence to indicate that the railroads were the common source of both the allegedly prejudicial and preferential treatment. If anything, the difference in total freight charges paid by the Long Island and non-Long Island shippers is the result of the Long Island's voluntary application of its 12.5 percent terminal surcharge.

2. Under Section 1(6) of the Act all railroads have an obligation to establish, observe and enforce just and reasonable rate practices and regulations. Unjust and unreasonable rate practices and regulations are made unlawful. Whether the circumstances and conditions are sufficiently dissimilar to justify differences in rates or charges is a question of fact for the determination of the Commission. United States v. Interstate Commerce Commission, 352 U.S. 158, 1 (1956). Here, the Commission properly concluded that no Section 1(6) violation had been committed. As we have just stated, there was no evidence of any rate disparity or any shipper injury. Indeed, the Long Island receivers did not even challenge the railroads' proposal before the Commission. In these circumstances, the new rates on fresh fruits and vegetables clearly do not result in an unlawful practice in violation of Section 1(6) of the Act.

II

THE COMMISSION'S ACTION WAS NOT BASED ON ITS BELIEF THAT THE LONG ISLAND'S DISPUTE WITH THE OTHER RAILROADS CENTERED OVER THE DIVISION OF RATE REVENUES

The Long Island also argues on brief that the Commission failed to grant it any relief because it was currently engaged in discussions with the other railroads over the division of rate revenues. In essence, the LIRR contends that the Commission improperly confused the rate issue present in this proceeding with an unrealated divisions issue. As we shall show, there is simply no merit to this position.

Briefly stated, a division is a railroad's share of a joint rate paid by a shipper of a given commodity that is transported over two or more railroad lines.[5/] The division that each railroad receives is either voluntarily agreed upon by the railroads in question or is prescribed by the Commission. When the Commission prescribes the divisions of joint rates pursuant to Section 15(6), it gives due consideration among other things to five specific criteria set out in Section 15(6).[6/] The divisions applicable to the Long

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5/ Divisions may also be applicable to fares and other charges.

6/ The criteria set out in Section 15(6) are:

(1) the efficiency with which the carriers concerned are operated;
(2) the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation;
(3) the importance to the public of the transportation services of such carriers;
(footnote continued, next page)

Island's joint rates are the result of both voluntary agreements among the carriers, and divisions prescribed by the Commission. At present the Long Island's division of joint rates to and from points on LIRR is 16 percent of the total joint rate applicable over the entire route of movement between origin and destination. The divisions have been increased from 14 percent in Docket No. 35153, Long Island R.R. Co. v. Ahnapee & Western Ry. Co. (decided April 13, 1973).

While the LIRR and the other railroads are presently engaged in a discussion over further revision of existing divisions, the existence of the divisions issue played no part in the Commission's decision. The Commission concluded with regard to the LIRR's rate situation (Doc. No. 57, p. 3):

> We find, That the evidence of record fails to establish that the rates to points on the LIRR, when combined with the LIRR's surcharge (footnote omitted), result in unequal total transportation charges in violation of sections 1(6) and 3(1) of the act; that the record does not show that receivers on the LIRR are unduly prejudiced by the differences in rates and none have appeared or otherwise complained they are so prejudiced; that in fact, as is noted by the LIRR, the rates to points on its lines are lower than rates to other New York group points because they have failed to join the new rates.

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fn. 6/
cont'd

(4) whether any particular participating carrier is an originating, intermediate, or delivering line;
(5) any other facts or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or lesser proportion than another carrier of the joint rate, fare or charge.

Nothing in this discussion even remotely relates to the question of divisions.

The Long Island, however, would have this Court ignore that portion of the Commission's order and concentrate on the Commission's further comment on the existing dispute over the division of rate revenues. The Commission stated in this regard (id.):

> that it is also noted by the parties that a division's (sic) dispute is in progress between the LIRR and the other carriers; that the 4R Act established new procedures for the handling of division disputes in §15(6)(b); and therefore, it is inappropriate at this time to make any determination on this issue.

In the Long Island's view this language shows that the Commission denied its complaint because of the pending divisions dispute. Nothing could be farther from the case. The Commission was simply noting the existence of the dispute and stating that it was not an appropriate subject for consideration in this proceeding. As such, the Commission's comment had no bearing on its disposition of the LIRR's complaint.

III

THE COMMISSION'S ORDER IS CONSISTENT WITH ITS DECISION IN DOCKET NO. 35960

The Long Island argues at great length that the Commission's order is somehow inconsistent with its decision in Docket No. 35960, Sunkist Growers, Inc., et al. v. The Akron, Canton & Youngstown Railroad Company, et al. The Commission's order in Docket No. 35960 is neither inconsistent with the decision reached in this case, nor does it compel a contrary result.

In the Sunkist proceeding three large citrus fruit shippers filed a complaint with the Commission against the railroads (including the LIRR) contending that the then existing rates on fresh citrus fruit from California and Arizona to points throughout the United States and Canada violated Sections 1(5), 1(6) and 3(1) of the Act.[7/] In their complaint the shippers sought the cancellation of the existing rates, and the prescription of incentive rates in their place. While the railroads eventually published incentive rates as requested by the shippers, the Commission found that the railroads' failure to establish incentive rates at a lower level for traffic destined to points on the LIRR violated Sections 1(5) and 1(6) of the Act. In substance, the Commission prescribed rates to the Long Island based on a lower level that, when combined with the Long Island's 5 percent terminal surcharge, approximated the level

7/ The railroads voluntarily published incentive rates after an ALJ had directed them to establish and maintain incentive rates on fresh citrus fruit.

prescribed by the Commission for the other railroads. The Commission's decision is now under judicial review in The Atchison, Topeka & Santa Fe Railway Co., et al. v. Interstate Commerce Commission (U.S.C.A,, 5th Cir., No. 77-1946).

There is no merit to the Long Island's contention that the Commission should have reached the same result in the case at bar. As we have already established, the instant case involved: (1) a carrier initiated rate proposal; (2) no participation in opposition to the proposal by any Long Island receiver;[8/] (3) no evidence of any rate disparity, prejudice or injury. The Sunkist proceeding, on the other hand, involved: (a) a shipper complaint that

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8/ We note that S & K Farms, Inc. and Freight Users Association of Long Island, Inc. (FUA) have intervened in this court proceeding in support of the petitioner. While the Commission did not oppose their intervention, we submit their opposition at this time has a distinctly hollow ring. First, S & K Farms, Inc. never sought to participate in the Commission proceeding. While FUA belatedly sought to intervene, it did not do so until after the Commission's action had become administratively final. In these circumstances, they hardly have a right to complain about the Commission's action at this point in time. Second, absent the unproven assertion of S & K Farms, Inc., there is no evidence of record to establish that either intervenor actually receives the commodities which were in issue before the Commission. Third, the intervenors have instituted a complaint proceeding against the LIRR and the other railroads before the Commission in Docket No. 36651, S & K Farms, Inc., et al. v. LIRR, et al. In their complaint the intervenors raise the same issues they make here. Thus, they will have ample opportunity to prove their charges in Docket No. 36651.

existing rates were unjust and unreasonable; (b) an uncontested finding by the Commission confirming the shipper's contention; and (3) prescription of new rates at a just and reasonable level, including prescription at a just and reasonable lower level to accommodate the LIRR's terminal surcharge. In short, there was no need to prescribe rates at a lower level to points on the Long Island in the instant case because there was no probative evidence to indicate -- as there was in the Sunkist case -- that the railroads' rate practices were unjust or prejudicial. Hence, the two proceedings are fully consistent with one another.

CONCLUSION

The order of the Interstate Commerce Commission should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 2nd day of September 1977, I have served true and accurate copies of the foregoing Brief For The Interstate Commerce Commission, upon counsel for parties of record, postage prepaid, as follows:

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ADDENDUM

Section 1(6) of the Interstate Commerce Act, 49 U.S.C. 1(6), provides:

(6) It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 15(6) of the Interstate Commerce Act, 49 U.S.C. 15(6), provides:

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions therof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.